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# In the Supreme Court of the United States

OCTOBER TERM—1967

WILLIAM TWYMAN, dba BILL'S UNION STATION, et al.,
*Appellants and Petitioners for Intervention,*

vs.

UNITED STATES OF AMERICA; BLUE CHIP STAMP COMPANY; ALEXANDER'S MARKET; LUCKY STORES, INC.; MARKET BASKET; PURITY STORES, INC.; RALPH'S GROCERY COMPANY; SAFEWAY STORES, INCORPORATED; THRIFTIMART, INC.; THRIFTY DRUG STORES CO., INC.; and VON'S GROCERY CO.,
*Appellees.*

On Appeal from the United States District Court for the Central District of California

## Jurisdictional Statement

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On Appeal from the United States District Court for the Central District of California

## Jurisdictional Statement

Appellants are 1775 independent California service station operators who are plaintiffs in a private treble damage antitrust action against the Blue Chip Stamp Company pending in the United States District Court for the Central

District of California, entitled *Twyman, et al. v. Blue Chip Stamp Company,* No. 66-1522-F. Appellants are herein appealing from an order denying their motion to intervene and to set aside a Final Judgment entered by consent on June 5, 1967, in a similar antitrust action brought by the United States against the Blue Chip Stamp Company and its chain store incorporators. Appellants also directly appeal from this Final Judgment of June 5, 1967. This statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

## OPINION BELOW

The opinion of the District Court for the Central District of California which was filed on August 18, 1967, is not yet reported but is attached hereto as Appendix A. The order of August 3, 1967, denying the motion to intervene and to vacate the consent decree, is attached hereto as Appendix B. The final judgment of the court entered on June 5, 1967, with the accompanying plans of reorganization for the Blue Chip Stamp Company, and the rejected consent decree of October 28, 1966, are attached hereto as Appendices C and D respectively.

## JURISDICTION

On December 26, 1963, the United States of America filed a complaint against the Blue Chip Stamp Company; Alexander's Market; Lucky Stores, Inc.; Market Basket; Purity Stores, Inc.; Ralph's Grocery Company; Safeway Stores, Incorporated; Thriftimart, Inc.; Thrifty Drug Stores Co., Inc.; and Von's Grocery Co., in the United States District Court for the Central District of California, under Section 4 of the Clayton Act (15 U.S.C. 4), to prevent and restrain

the above-named defendants from monopolizing the trading stamp business in California, and from otherwise violating Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2). On June 5, 1967, a final judgment was entered by consent in this action after appellants had appeared and argued as amicus curiae in opposition to this judgment. On June 15, 1967, appellants—William Twyman and 1774 independent service station operators—served a motion to intervene in said action and to set aside the final judgment entered on June 5, 1967. On August 3, 1967, the United States District Court for the Central District of California entered an order denying this motion. A timely notice of appeal was filed on August 4, 1967, in the District Court. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Section 2 of the Expediting Act, 15 U.S.C. § 29, 62 Stat. 989 (1948). The following decisions sustain the jurisdiction of the Supreme Court to review this judgment on the direct appeal in this case: *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967); *United States v. California Coop*, 279 U.S. 553 (1929).

## QUESTIONS PRESENTED

I. Does the District Court have authority to reject a proposed antitrust consent decree, and to dictate the terms for and approve another consent decree which (a) substantially reduces the relief originally agreed upon between the Department of Justice and the defendants, and which (b) fails to dissipate the effects of established violations of Sections 1 and 2 of the Sherman Act, on the ground that the continuation of the unlawful monopoly is in the best interest of a segment of the public?

II. Did the District Court err in concluding that the standards of relief for monopolization cases articulated in

*United States v. Grinnell*, 384 U.S. 563 (1966), are not applicable to the formulation of antitrust consent decrees?

III. Is a motion to intervene, made within ten days after the entry of a consent decree in a Government antitrust action, timely under Rule 24 of the Federal Rules of Civil Procedure?

## STATUTES INVOLVED

Sections 1, 2 and 4 of the Sherman Act, 15 U.S.C. 1, 2, and 4; Section 2 of the Expediting Act of February 11, 1903, 15 U.S.C. 29; Rules 24 and 59(e) of the Federal Rules of Civil Procedure are attached hereto as Appendix E.

## STATEMENT

### Introduction

Appellants, who are 1775 independent California service station operators, are appealing from a denial of their motion to intervene and to set aside a consent decree[1] entered in an action under §§ 1 and 2 of the Sherman Act by the United States against the Blue Chip Stamp Company (hereinafter Blue Chip) and nine of its chain store incorporators.[2] The terms of this consent decree result primarily from the rejection by the court of an earlier consent decree. At the time of this rejection, the District Court outlined the specific terms that it believed should be included in the decree (Tr 404-7),[3] and the consent decree as entered contains those terms in substance. (See App. C).

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1. Appellants also appeal directly from this Final Judgment of June 5, 1967.

2. These chain store incorporators are: Alexander's Market; Lucky Stores, Inc.; Ralph's Grocery Company; Market Basket; Purity Stores, Inc.; Thriftimart, Inc.; Thrifty Drug Stores Co., Inc.; Safeway Stores, Incorporated; and Von's Grocery Co.

3. The following abbreviations will be used hereinafter in citing to the record: Tr—Transcript; R—Record; App—Appendix.

Appellants contend that the approved consent decree perpetuates the effects of established violations of §§ 1 and 2 of the Sherman Act, whereas the rejected consent decree (See App. D) would have dissipated these effects, thus protecting the appellants and the California public in general. Appellants submit that in accepting the second and rejecting the first decree, the District Court applied an incorrect legal standard and acted in a manner that is inconsistent with the provisions of the Sherman Act and the proper role of the District Court with respect to the entry of consent decrees.

**Established Facts Concerning the Blue Chip Monopoly**

The Blue Chip Stamp Company was incorporated in California in 1956 by nine competing chain store supermarkets and one chain drugstore,[4] for the avowed purpose of establishing their own mutually owned and controlled stamp company as an alternative to competing for S&H trading stamps and other trading stamps (R. 2146-7), which were then beginning to enter the California market (R. 261-2; 267-8; 467).

The company was not founded for the purpose of earning profits upon the sale of trading stamps (R. 770; 848-9); but for the purpose of curtailing the use of stamps because of the expressed view "that the distribution of trading stamps, particularly by food markets, is detrimental to the merchants, their customers and suppliers." (R. 770; 848-9).

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4. There were three other smaller markets which were sold class B shares of stock in Blue Chip; however, the rights of these class B shareholders were severely limited and they were not even permitted to vote for nine of the eleven places on the Board of Directors (R. 285-9; 469). These holders of Class B shares and two supermarkets which subsequently sold all their class A shares (R. 220-1) were not made defendants in the government action and are not now appellees before this Court.

Prior to the formation of Blue Chip, this belief was communicated by an exchange of letters between the competing chain supermarkets (R. 261-77; 467). In these letters each chain market would indicate its opposition to trading stamps and its steadfast refusal to adopt any trading stamp plan.[5] The letters would then promise to give all the other competing chain markets "ample notice of any deviations in our policy" (R. 261; 467). The principal executives of these competing chain markets then attended a series of organizational meetings held at hotels and other places (R. 468-9; 2146-7; 1787-9). At one of these meetings Robert M. Laverty, President of Appellee Thriftimart, Inc., set forth the objectives of these competing chain markets as follows: "Fellow Grocerymen, this meeting has been called to discuss the trading stamp racket and to notify you with regard to what eight local chains have decided to do about it. That will be to form a corporation and put out their own trading stamps." (R. 1787-8). Following these organizational meetings Blue Chip was formed and each of the supermarkets received a sufficient number of shares of stock to insure a seat on the Board of Directors (R. 278-90; 219-21). In fact, the original Board of Directors consisted of one representative from each of these competing companies (R. 222-223) and at all times the representatives from these competing companies had voting control of the Board (R. 222-225; 279-290). At the first meeting of the Board of Directors, resolutions were passed which insured the accomplishment of the objectives of the company which had been previously agreed upon. It was agreed that Blue Chip stamps would

5. For example, a letter from Mr. T. A. Von der Ahe of Von's Grocery Company addressed to eleven competing markets states: "We have steadfastly resisted any type of plan involving trading stamps and will continue to do so, notwithstanding the competition offered by a comparatively few opportunists whose short-sightedness has led them into the stamp deal in this area." (R. 261; 467).

not be sold to any retailer who used another type of trading stamps (R. 295; 477-8).

It was also agreed by resolution that Blue Chip stamps would only be distributed in those geographic areas which were specifically designated by the Board of Directors (R. 296, 447-8). It was later agreed that Blue Chip stamps would not be sold to any retailer who deviated from the rate established by the chain markets for the distribution of these stamps (i.e., 1 stamp for every 10¢ of purchase) (R. 253-9; 480-8). This restriction on what in effect was the price of Blue Chip stamps was later held to be a direct violation of the Sherman Act. *Purity Stores, Inc. v. Blue Chip Stamp Co.*, C.C.H. 1963 Trade Cas. 78,589 (N.D. Calif.).

Pursuant to the resolutions adopted by the Board of Directors, Blue Chip stamps were first issued in the Sacramento area in June, 1956, simultaneously by all the competing chain store incorporators doing business in that area (R. 249-52; 296; 477-78). Gradually the sales of the company were expanded in the same manner—one geographic area at a time when the threat of S & H and other trading stamps was the greatest (R. 252; 478; 790-815). However, the company at all times tried to "delay introducing Blue Chip Stamps in any area until it becomes a problem." (R. 790). During this period between 1956 and 1960, none of the competing chain markets distributed Blue Chip trading stamps in any area not specifically designated by the Board of Directors of Blue Chip, but when a new area was designated, all would begin distributing in that area (R. 786-810). For example, prior to the passage of the required resolution of the Blue Chip Board of Directors authorizing the issuance of Blue Chip stamps in Southern California (R. 252; 301; 479) not a single Blue Chip stamp

was distributed by any of the appellee supermarkets in the entire Southern California area (R. 794, 479) although the bulk of appellees' chain supermarket grocery business apparently was then located in Southern California (R. 3). After the passage of the resolution, $500,000 was spent to popularize the stamps in Southern California (R. 252; 480) and all the competing chain stores commenced distribution of these stamps on exactly the same day (R. 479). As a result, by 1962 Blue Chip was doing 76% of the total trading stamp business in the Los Angeles area on a dollar basis and was doing 65% of the trading stamp business in the State of California as a whole on a dollar basis (R. 212; 776-78).

**The Government's Complaint**

On December 2, 1963, the United States filed a complaint alleging that the Blue Chip Stamp Company and the other above-named chain store incorporators of Blue Chip had by virtue of the facts set forth above monopolized the trading stamp business in California and otherwise violated §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2). The complaint sought to require "each of the defendant chain stores to divest itself of ownership of all stock in Blue Chip", and to enjoin these chain stores "from controlling or attempting to control Blue Chip" and from agreeing to regulate the rate of issuance of these stamps (R. 15). All of the facts alleged in this complaint were assumed to be true by the District Court for purposes of passing on the proposed consent decrees described below (Tr. 401).

**Rejection of the Decree of October 28**

On October 28, 1966, a proposed consent decree (App. D) was lodged with the Court (referred to hereinafter as

Consent Decree of October 28). The decree of October 28[6], among other things, would have (1) required that the Blue Chip Stamp Company be dissolved and that its assets be sold to a new stamp company, whose management would be independent of the defendant retailers or any other business entity which purchased its trading stamps;[7] (2) enjoined the future use of the "Blue Chip" name by the successor stamp company; and (3) prevented the new stamp company from creating a vast public demand for its stamps by severely limiting the number of stamps which could be distributed as premiums on the retail sale of foods.[8]

Various grocer associations and the State of California appearing as amicus curiae objected to the proposed consent

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6. This decree was agreed to by all defendants except Market Basket and Thriftimart. An earlier consent decree also agreed to by all defendants except Market Basket and Thriftimart was withdrawn by the United States.

7. This result was insured by not only preventing the new company "from having as an officer or employee any person who, while holding such a position, also serves as an officer, director, or employee of any person using trading stamp services", but was also insured by preventing the new company "from having, for a period of ten years following the closing date, as a director, any person who while holding such position, also serves as an officer, director or employee of any person who was a Blue Chip stockholder in 1956 or 1957", and by restraining each consenting retailer defendant "from having as an officer, director or employee any person who, while holding such position, also serves as an officer, director or employee of the new company." Proposed Final Judgment of October 28, 1966, pp. 53-4, attached as App. D.

8. This was accomplished by providing that if the government could show that "for the nine month period concluding the test" the new company distributed for use in retail food stores in the northern market area, or the southern market area, trading stamps which convert to 30% or more of the retail food store sales in that market area, then other provisions of the plan would go into effect which would reduce the number of stamps distributed on retail food sales. Such reduction was accomplished to a large degree by reducing the number of stamps distributed to large chain markets. (Proposed Final Judgment of October 28, 1966, pp. 54-60, attached as App. D.)

decree[9] arguing that the ability of California independent grocers to compete with the chain markets was due in large part to the "non-franchised trading stamp services of Blue Chip . . ." and that curtailment of Blue Chip's business, which could be accomplished by the consent decree of October 28, would seriously injure many of these small grocers and would ultimately result in a greater "concentration of economic power in the retail grocery trade" which would not be in "the public interest." (R. 2076; 2104).

The Department of Justice opposed these arguments of the various grocer associations and State of California, pointing out that § 2 of the Sherman Act and the case law do not permit the existence of a monopoly in the trading stamp industry, regardless of "speculations as to what the effects of competition in the trading stamp business might be on competition in the grocery business." (R. 2193). It was for this reason that the Department of Justice refused to agree "that the proposed judgment be modified to allow Blue Chip, or any successor company, to maintain its illegally acquired monopoly position." (R. 2193).

Hearings were held on this proposed consent decree, at the conclusion of which the District Court rejected the decree of October 28 for the reason that it would do nothing "which will destroy in any way, in any degree, the small independent grocer" because the grocery industry is "more vital to the economy of California than the stamp industry." (Tr. 458-9; Vol. 4, p. 46-7).

The District Court then outlined the terms of a decree it would consider acceptable. (Tr. 404-12; 458-9). The District

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9. Appellants also filed a amicus curiae brief objecting to those narrow provisions of the proposed decree which it was suggested might have enabled Blue Chip to immediately transfer all its assets to the successor company without the successor company being financially responsible for damages suffered by private antitrust plaintiffs for Blue Chip's violations of the antitrust laws. (R. 2365)

Court believed such a decree should (1) allow the continued use of the Blue Chip name; (2) allow "all of the employees, particularly management of Blue Chip to go to the next company right away"; (3) allow the new company to enter "the profit field"; and (4) "at the end of a certain number of years, two or three, a sufficient period of time to insure that the new company is viable, . . . present to the court a plan to sell within a geographical area one-third of its existing business." (Tr. 404-406).

**Submission and Entry of Next Consent Decree as Final Judgment on June 5, 1967**

On April 28, 1967, another consent decree was lodged which substantially adopted all the terms recommended by the District Court. (App. C). On May 22, and June 2, 1967, appellants served amicus curiae briefs vigorously opposing the entry of the proposed decree, arguing that it would not dissipate Blue Chip's monopoly as required by law. (R. 2514, 2616). These amicus curiae briefs also pointed out the damaging effect of the monopoly upon independent service stations who purchased the stamps. (R. 2514; 2616).

On June 5, 1967, oral argument was held on the proposed consent decree. Counsel for appellants, as well as counsel for other interested entities, appeared and argued in opposition to the entry of this decree. (Tr. 413-502). However, the District Court rejected the arguments of appellants and others and, on June 5, 1967, signed the proposed decree (R. 2640; 2668).

**Procedural Steps Taken to Challenge the Consent Decree Subsequent to Its Entry and to Perfect This Appeal**

Utilizing substantially the same procedure which was employed in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), appellants, within ten days

after the entry of the consent decree as Final Judgment on June 5, served a motion to intervene and to vacate the consent decree. (R. 2691).

On July 31, a hearing was held on appellants' motions and on similar motions by the Thrifty Scrip Stamp Company (a competing California trading stamp company), and Raley Markets (a non-defendant shareholder in Blue Chip) (Tr. 502; Vol. 4, pp. 1-74).

On August 3, 1967, the Court entered an order denying appellants' motion and the other motions to intervene primarily on the ground that they were not timely. (R. 3065). On August 4, 1967, appellants filed their Notice of Appeal, appealing from the Final Judgment of June 5. (R. 3065). On August 18, 1967, the District Court filed its Opinion Denying Motions to Intervene and To Vacate Consent Decree (R. 3201-20, App. A) holding in principal part that the motions were not timely made (App. A 6-12); that this Court's opinion in *United States v. Grinnell,* 384 U.S. 563 (1966), is inapplicable to consent decrees (App. A. 17); and that the preservation of Blue Chip was necessary "in order to permit small retail businesses in California to compete with large chain establishments." (App. A. 18).

## THE QUESTIONS ARE SUBSTANTIAL

### I. Standards for the Acceptance or Rejection of Proposed Antitrust Consent Decrees Should Be Established by This Court

Consent decrees in government antitrust actions have been a matter of great concern for Congress and the Department of Justice since the turn of the century. Since that time District Courts have entered thousands of antitrust decrees which have set the pattern of competition for some of the nation's most important industries.[10] However,

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10. e.g. *United States v. International Business Mach. Corp.,* 1956 Trade Cas. 71, 117 (S.D.N.Y.)

this Court has never determined whether it is proper for a District Court to reject a decree consented to by both sides; and even if it should be held that such rejection is permissible in compelling circumstances it remains to be determined when those circumstances are present. The action of the District Court in this case in rejecting a proposed consent decree dictating terms for (R. 404-08) and thereafter approving another consent decree on the ground that the dissipation of a monopoly is not in the interest of a segment of the public (R. 458-9) demonstrates the consequences of this lack of standards. This result occurred because the District Court believed that the standards for adequate relief in monopolization cases set forth in *United States v. Grinnell,* 384 U.S. 563 (1966), were inapplicable since the present case, unlike *Grinnell,* was not litigated to final judgment. (App. A. 17).

Although there are as yet no definitive standards in this area, appellants will demonstrate in the second section of this statement that the District Court's action in this case is impermissible under any standard. However, appellants will first explain why, because of certain basic changes in Justice Department policy, there is a compelling need for this Court to establish standards for the guidance of District Courts in accepting or rejecting antitrust consent decrees.

Over the years, the Department of Justice has developed regular procedures for the negotiations of antitrust consent decrees. Phillips, *Antitrust Consent Decrees,* 18 WASH. & LEE L. REV. 39, 46-50 (1961). These procedures have proved so effective that nearly three out of every four of the civil antitrust cases commenced by the Department of Justice are ended by consent decrees. Consent Decree Program of the Department of Justice, Report of the Anti-

trust Subcommittee, Committee on the Judiciary, House of Representatives, 86 Cong., January 30, 1959, p. IX. A great deal of time and effort is spent by the Department of Justice in drafting the terms of these decrees and the effects of these decrees on the pattern of competition in the industry in question is thoroughly investigated through consultations and detailed economic studies. Consent Decree Program of the Department of Justice, Antitrust Subcommittee on the Judiciary, House of Representatives, 85 Cong., Serial Number 9, pp. 431-32. Generally the courts have been reluctant to tamper with the terms of these carefully constructed consent decrees.[11] Not only has this Court indicated that the terms of these decrees should normally not be questioned, *United States v. Ward Baking,* 376 U.S. 327 (1964), see *Sam Fox Publishing Co., et al. v. United States,* 366 U.S. 683, 689 (1961), but over the years only one District Court prior to this case has seen fit to reject a government proposed consent decree. *United States v. Pan Am World Airways, Inc.,* 1959 Trade Cas. 75, 138 (S.D.N.Y.). Also, it must be noted that in that one case the District Court did not attempt, as was done in the present case, to dictate terms for inclusion in a later decree. *Ibid.*

There are good reasons for this judicial reluctance to interfere with terms of consent decrees. The specific terms of consent decrees determine the structure of competition in many of this country's major industries. For instance, the pattern of competition in the meat packing industry is set by the terms of the Swift decree, *United States v. Swift*

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11. See M. Goldberg, "The Consent Decree: Its Formulation and Use" 20 (Michigan State University Bureau of Business Economic Research Occasional Paper No. 8, 1962). Professor Phillips states: "Generally, consent decrees are accepted and signed by the court as a routine matter." Phillips, *The Consent Decree in Antitrust Enforcement,* 18 WASH. & LEE L. REV. 39, 41 (1961).

*& Company,* 286 U.S. 106, 111-12 (1932). The pattern of competition in the computer industry is determined by the terms of the IBM decree, *United States v. International Business Mach. Corp.,* 1956 Trade Cas. 71, 117 (S.D.N.Y.). The pattern of competition in the telephone industry is determined by the Western Electric decree, *United States v. Western Electric Co.,* 1956 Trade Cas., 71, 134 (D.N.J.). The structure of competition in the California trading stamp industry would also have been set by the terms of the consent decree which was rejected by the District Court in the present case.

Although District Courts have in the past shown great reluctance to interfere with the terms of government proposed consent decrees, a recent change in Justice Department policy makes it inevitable that District Courts will now be frequently faced with the temptation to reject government proposed consent decrees and to insist on the inclusion of other terms in later decrees. Until recently, the Justice Department held consent decree negotiations in complete secrecy, and the terms of such consent decrees were not promulgated in advance of approval.[12] Under this former Justice Department policy, the alteration of consent decrees such as occurred in this case was not a real possibility since non-parties, such as the California Grocers Association, could not learn of the terms of a decree and formulate objections in advance of the actual approval of the decree. However, Justice Department policy has now been changed so that trade associations and other special interest groups can learn in advance of the terms of these decrees and formulate objections. 2 Fed. Reg. 6026 (1961).

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12. Goldberg, "The Consent Decree; Its Formulation and Use" 68-69 (Michigan State University Bureau of Business and Economic Research Occasional Paper No. 8, 1962).

This case is the first case known to the appellants in which as a direct result of this new Justice Department policy a District Court has succumbed to the temptation to alter a government proposed consent decree. As will now be demonstrated, the action of the District Court in this case illustrates the need for this Court to set adequate standards for the guidance of other District Courts which will inevitably be presented with similar temptations based upon objections from other non-party special interest groups.

## II. Acting Under the Erroneous Assumption That the Standards of Relief for Monopolization Cases Articulated in United States v. Grinnell, 384 U.S. 563 (1966) Were Not Applicable to Antitrust Consent Decrees, the District Court Rejected an Effective Antitrust Consent Decree and Thereafter Entered a Decree Which Will Not Dissipate Blue Chip's Illegally Acquired Monopoly

The District Court's rejection of the consent decree of October 28, its dictation of terms for, and subsequent approval of the consent decree of June 5 on the ground that nothing would be done in the case "which will destroy in any way, in any degree, the small independent grocer" because the grocery industry is "more vital to the economy of California than the stamp industry" (Tr. 458-9), conflicts with the standards for relief in monopolization cases set forth in *United States v. Grinnell*, 384 U.S. 563 (1966). This conflict arises because the District Court held that the standards set forth for relief in *Grinnell* were inapplicable to consent decrees. (App. A. 17). Appellants contend this holding is incorrect and the Court erred in imposing upon the Government a decree which in fact failed to meet this Court's standards respecting the relief to be given in monopolization cases.

(A) A consent decree must dissipate the effects of a monopoly just as thoroughly as a litigated judgment because a consent decree is not a mere contract between the parties; it is a "judicial act" and the effect of a decree is the same "whether the decree has been entered after litigation or by consent." *United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932).

There is simply no warrant for concluding, as did the District Court, that a consent decree in a Section 2 case should do any less than "put an end to the combination and deprive the defendants of any of the benefits of the illegal conduct, and break up or render impotent the monopoly power." *United States v. Grinnell, supra,* at 577. That is the standard by which Section 2 decrees are to be judged; neither history, nor precedent, nor logic permits this principle to be ignored or modified when the parties have agreed upon a consent decree.

It bears repeating that the Government proposed a decree which generally complied with the requirements of the antitrust laws as most recently articulated in *Grinnell*. Although acceptable to the parties, the Court rejected that decree which would have dissipated the taint of monopoly power. That distinguishes this case from the situation where the court is concerned that the proposed decree is not equal to the task; here the original decree was rejected by the court precisely because it was effective in the way Section 2 contemplates.[13]

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13. That the Government *subsequently* consented to a weaker decree must not on these facts preclude review. The cases discussed, *supra*, holding that a court will not inject itself in the process of reaching consent judgments forbid what the District Court did in rejecting the first decree; those cases do not preclude review of that error merely because the Government, rebuffed by the District Court, settled for a less effective decree. In fact, the Government itself, cannot effectively seek review of the District Court's action

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The District Court erred, we submit, in concluding that the law permitted a remedy which did not fully dissipate the unlawful monopoly. One searches the lower court's opinion in vain for any justification for its bald assertion that "the authorities do not require complete divestiture where a consent decree, rather than a litigated judgment, is entered." (App. A 17.) No justification for that conclusion comes readily to mind. If the formula for relief discussed in *Grinnell* is a legal minimum, the deviation from which will (as in *Grinnell)* result in reversal, why should lesser relief be imposed merely because the Government's charges are not contested? Congress has not provided for a procedure by which monopolists may confess their past sins and, in reward for the admission, be permitted to continue to reap the fruits of their illegal conduct. The irony of the District Court's theory is that the weakest decrees are entered in the cases of defendants whose antitrust violations are so egregious that they have concluded it would be inadvisable to contest the Government's claims.

(B) In rejecting the proposed consent decree, the District Court purported to balance the interests of "the small independent grocer" against the goals of the antitrust laws. Appellant submits that the statute permits no such weighing of interests; Congress has forbidden monopolization in favor of competition, and that model may not be sacrificed to the interests of any one economic group.

This principle was aptly stated by Judge Learned Hand:

> "Be that as it may, that was not the way that Congress chose; it did not condone 'good trusts' and con-

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in rejecting the consent decree since such rejection is not immediately appealable as a final judgment, 15 U.S.C. 29, and since such rejection would probably be considered moot should the Government elect to litigate the case to final judgment. See *MacArthur Liquors, Inc. v. Palisades Citizens Ass'n., Inc.*, 265 F.2d 372 (D.C. Cir. 1959); *Adelman v. Paramount Pictures, Inc.*, 182 F. Supp. 217 (S.D. Tex. 1960).

demn 'bad' ones; it forbad all." *United States v. Aluminum Company of America,* 148 F.2d 416, 427 (2d Cir. 1945).

Moreover, the Blue Chip monopoly was acquired in direct violation of Sections 1 and 2 of the Sherman Act. *Purity v. Blue Chip Stamp Co.,* 1963 Trade Cas., 78,789 (N.D. Cal.).

The District Court itself assumed for purposes of its decisions upon the consent decrees that the allegations contained in the government complaint had been conclusively proven "concerning all of the defendants who are before the Court" and that these allegations would have to be accepted as "established fact." (Tr. 401).

Under these circumstances, it is essential that the decree break up the monopoly because "those who violate the (Sherman) Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the pleas of hardship or inconvenience." *United States v. Crescent Amusement Co.,* 323 U.S. 173, 189 (1944). To do less confers an unwarranted benefit on defendants whose antitrust violations are so egregious that they conclude it would be inadvisable to contest the Government's claims.

The District Court's concern that the dissipation of Blue Chip's monopoly would have undesirable consequences on the grocery industry is misplaced. The question of whether some combination or restriction on trade may be permitted in one industry when the effect of such combination or restriction is beneficial in another industry has been presented to this court on several occasions. In *United States v. Crescent Amusement Co.,* 323 U.S. 173 (1944), for example, several independent theatres were convicted of monopolizing a small area of Tennessee. The defendants objected to the government decree on the grounds that

there was a great concentration of economic power among the producers of movies[14] and that the decree by weakening the power of the exhibitors would lessen competition in the industry as a whole. 323 U.S. at 187. This Court rejected the argument of the small theatre owners stating:

> "It is not for us, however, to pick and choose between competing business and economic theories in applying this law. Congress has made that choice. It has declared that the rule of trade and commerce should be competition, not combination. (citations omitted.) Since Congress has made this choice we cannot refuse to sustain a decree because by some other measure of the public good the result may not be desirable." 323 U.S. at 187-8.

See also *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954); *Kiefer Stewart v. Seagrams*, 340 U.S. 211 (1951).

This Court has also rejected the argument that hardship on some non-party group should preclude the approval of a consent decree. In *United States v. E. I. du Pont de Nemours & Co., et al.*, 366 U.S. 316 (1961), the government proposed a decree following a litigated judgment which would have resulted in a tax liability of about one billion dollars on the non-defendant shareholders of du Pont. 366 U.S. at 320. For this reason the District Court rejected the decree proposed by the government and entered another decree. This Court reversed, holding that the government cannot be denied an effective remedy

> "because economic hardship, however severe, may result. Economic hardship can influence choice only as among two or more effective remedies. If the remedy chosen is not effective, it will not be saved because an

14. Indeed at this very time the major producers, Paramount, Warner Bros., and 20th Century Fox, were being sued by the government for monopolizing the whole industry. (Tr. 50).

effective remedy would entail harsh consequences." 366 U.S. at 327.

Furthermore, in this case there is a substantial non-party group whose interests are diametrically opposed to those of the independent grocers purportedly favored by the rejection of the original proposed consent decree.[15] The record establishes the extremely injurious effects of the Blue Chip monopoly on appellants, independent California service station operators. (R. 2616-39, 2898, 2907). This injects an element not fully considered by the District Court; indeed it is precisely because the task of trying to weigh the interests of various non-party economic groups is so difficult that it ought not be attempted. The sole inquiry must be whether the decree terminates the illegal monopoly.

The District Court in this case rejected a consent decree which would have been effective in breaking up a monopoly and entered another decree which is concededly less effective (Tr. 458-59, 652-57) and which in fact is intended to preserve aspects of the monopoly because of its supposed beneficial effects in another industry. (Tr. 458-59). This approved consent decree in fact contains features which this Court found defective in *United States v. E. I. du Pont de Nemours et al.*, 366 U.S. 316, 326-335 (1961). Unlike the rejected decree, it does not require the dissolution of Blue Chip but rather permits the competing chain supermarkets to retain over 40% of their stock in Blue Chip and also permits Blue Chip's present management to acquire 10% of Blue Chip's stock. (App. C. 40-45). Although the chain supermarkets' stock is to be voted by an independent

15. The record, however, indicates that, contrary to the view of the District Court, the monopoly does not benefit independent grocers (R. 2801-68).

trustee (App. C. 42, 44), it was this sort of provision which was found defective in *du Pont*[16] for the reason that there will be the same "intercorporate community of interest" which will induce those voting the *du Pont* shares to vote them "in such a way as to induce General Motors to favor du Pont" (366 U.S. at 331), and will induce the General Motors management to act with a view to the du Pont interests. 366 U.S. at 332.

In the present case the approved consent decree also motivates appellee supermarkets to act with a view to their stock interests in Blue Chip. For instance, these supermarkets would certainly not shift their business to another trading stamp company when such a shift would not only result in Blue Chip losing the profits from their business but also would trigger the loss of at least one third of Blue Chip's present business. (R. 2625). Under such circumstances it would be impossible for a competing trading stamp company to acquire one of appellee chain supermarkets as a customer; and it is agreed that a trading stamp company must acquire such a customer before it can enter the California market. (R. 2572).

The provisions of the approved consent decree also encourage the Blue Chip management to act with a view to the interests of appellee supermarkets. The consent decree and the accompanying plans of reorganization permit the present management, which has operated the company for the past ten years, to continue to manage the reorganized company and give this management a ten percent stock interest. (App. C. 41, 43). This management, which has in the past operated the company for the benefit and under the

16. Although the *du Pont* case was brought under Section 7 of the Clayton Act, the similarity of the objective for relief in cases brought under this section with the objectives of relief in monopolization cases makes *du Pont* a fully applicable precedent.

direction of appellee supermarkets, will be disposed and motivated to operate the reorganized Blue Chip in the same manner especially when this management knows that appellee supermarkets will regain their full voting rights at the end of ten years. (App. C. 41-42).

Those provisions of the approved consent decree which require the sale of one-third of Blue Chip's business (App. C. 32-35) will also be ineffective in dissipating the Blue Chip monopoly. This provision only introduces one new trading stamp company into the California market. *Furthermore, the specific provisions of the decree relating to this sale will have the effect of allowing both the reorganized Blue Chip and the purchasing company to operate as monopolies in separate geographic areas.* In fact, the decree itself provides that "the business to be offered for sale shall be located within a contiguous geographic area within Southern California" (App. C. 33 para. IX (1)) and *prevents Blue Chip from competing with this company for a period of one year.* (App. C. 33). At the conclusion of this one-year period, with both companies thoroughly entrenched in their own geographic areas, it would be in neither company's interest to jeopardize its own position by attempting to compete in the territory of its neighbor.

In contrast, the quota or "roll back" provisions of the rejected consent decree of October 28 would have effectively dissipated Blue Chip's monopoly. In fact, the approach of these provisions is probably the only effective way to break up a monopoly in the trading stamp industry.

Blue Chip, which is the only trading stamp company in the United States owned by its chain supermarket customers,[17] gained its monopoly through the mass distribution

17. Fulop, *The Role of Trading Stamps in Retail Competition* 31 (1964); Beem, *Who Profits from Trading Stamps*, HARVARD BUSINESS REVIEW, 123, 126 Nov.-Dec. (1957).

of trading stamps on the retail sale of food. In order to break that monopoly and allow other trading stamp companies to enter the California market, it is necessary to reduce the number of Blue Chip stamps which are distributed as premiums on retail food sales. (R. 2621-23). The consent decree of October 28 had this effect by preventing the issuance of stamps by Blue Chip's successor company on more than 30% of California retail food sales.[18]

The consent decree of October 28 also nullified the great public demand for these Blue Chip stamps (R. 2119-20), arising from the mass distribution of these stamps for the last ten years, by preventing the use of the "Blue Chip" name by the successor company. (App. D. para VII (A) (4)). The approved consent decree of June 5 notably lacks a similar provision, obviously essential if the effects of the monopoly are to be eliminated.

Not only does the consent decree of June 5 fail to dissipate the Blue Chip monopoly, but the provisions of this decree which permit present users of the stamps to purchase stock at bargain prices (R. 3174) in the reorganized Blue Chip company (App. C. 40-44) will have the effect of encouraging these users to continue to purchase Blue Chip trading stamps.

This examination of the consent decrees of June 5 and October 28 in the light of the law established by this Court establishes that the District Court used an incorrect legal

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18. This result was accomplished by setting up certain test periods and by providing that certain quota or "roll back" limitations would go into effect if more than 30% of the successor company's stamps were distributed on retail food sales in the test areas. (App. D. para. VIII (B) 1.). The brunt of the reductions in stamp usage if this quota or "roll-back" provision went into effect would fall primarily upon the large chain markets since small food retailers doing less than $500,000 a year and service stations were exempt from these "roll-back" provisions. (App. D. para. VIII (B) 4).

standard and that such use had the naturally expected effect—the consent decree of June 5 is totally ineffective in dissipating the monopoly and in fact will serve to perpetuate it.

### III. Appellants' Motion to Intervene Was Timely

The District Court denied appellants' motion to intervene and to vacate the consent decree primarily on the ground that these motions were not timely. (App. A. 6-12). Although there are other requirements for intervention set forth in Rule 24 of the Federal Rules of Civil Procedure, because of the District Court's opinion and this Court's decision in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), the question of timeliness is the only requirement which merits discussion at this time.[19]

Rule 24(a) of the Federal Rules of Civil Procedure states:

> "Upon timely application anyone shall be permitted to intervene in an action. . . ."

The only relevant date respecting the timeliness of appellants' motion is the date when appellants first received a copy of the consent decree ultimately approved by the

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19. Although the District Court's opinion holds that appellants do not meet the other requirements of Rule 24 F.R.C.P., the opinion assumes as a premise that appellants would meet such requirements if in fact the approved consent decree is defective. (App. A. 13-14). Indeed, the conclusion that appellants would meet the other requirements of Rule 24 F.R.C.P. if the consent decree is defective is obviously correct because if the decree is defective, and allows a continuation of the monopoly, appellants would in the language of Rule 24 certainly (1) "claim an interest relating to the property or transaction which is subject of the action," (2) be "so situated that the disposition of the action may as a practical matter impair or impede their ability to protect that interest" and (3) "not be adequately represented by existing parties." *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967).

Court. Prior to this date appellants had every reason to assume that the government would protect their interests by proposing a decree which would dissipate Blue Chip's illegally acquired monopoly. Appellants first received a copy of the defective consent decree on May 15, 1967, only twenty days before the scheduled date for the approval of this consent decree. (R. 3033-34).

After appellants had had an opportunity to inspect the proposed decree and accompanying plans of reorganization and discovered that the decree would not dissipate the monopoly, they served on May 22, 1967, an amicus curiae brief opposing the entry of the proposed decree. (R. 2537). This was the only course of action available to appellants because the local Court rules prevented a formal motion to intervene in advance of the date scheduled for the approval of the decree without special court order. Local Rules for Central District of California, Rule 3(e)(1). The statement of the District Court that "if petitioners had time to make known their opposition to the decree, (by serving amicus curiae briefs), they had time to file their applications to intervene" (App. A 7), ignores this fact.

The remarks of the Court also ignore the extra time which would have been required to research and prepare a motion to intervene and the extensive proceedings which were then occurring in appellants' own private antitrust action against the Blue Chip Stamp Company. (R. 3034). Under these circumstances appellants' filing of amicus curiae briefs (R. 2537, 2616) and their oral argument in opposition to the decree (Tr. 462-78) were the only effective and expeditious means of informing the District Court of their substantive objections to the proposed decree.

In addition, there was no possible injury or even inconvenience to the Court or to the parties by the approach

taken by appellants; their views were made available to the Court by the filing of *amicus* briefs. This served the identical function that intervention would have at that point. It was only *after* the decree was entered and appellants wished to protest and, if necessary, appeal from the decree as entered that it became necessary to file a formal motion to intervene.

Within ten days after the entry of the decree, appellants served their motion to intervene and to vacate the judgment. (R. 2691-99). This they were clearly entitled to do under the Federal Rules of Civil Procedure and the applicable case law.

Rule 59(e) of the Federal Rules of Civil Procedure states:

> "A motion to alter or amend a judgment shall be served not later than 10 days after entry of judgment."

Appellants' motion was made within the prescribed time limit and is therefore timely.

This Court has already held that a motion to intervene made after the entry of a consent decree is timely. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967). An examination of earlier cases discloses that motions to intervene have always been denied when made in advance of the entry of a government proposed antitrust consent decree and have only been granted when made after the entry of these decrees.[20]

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20. Petitions to intervene made in advance of the entry of a decree were denied in the following cases. *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961); *Sutphen Estates, Inc., v. United States*, 342 U.S. 19 (1951); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U.S. 173 (1944); *United States v. Radio Corp. of America*, 186 F. Supp. 776 (E.D. Pa.), *appeal dismissed*, 364 U.S. 518 (1960); *United States v. Loew's Inc.*, 20 F.R.D. 423 (S.D.N.Y. 1957); *United States v. Loew's, Inc.*, 186 F.

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## CONCLUSION

The District Court's entry of a consent decree which does not conform with the standards set forth in *United States v. Grinnell*, 384 U.S. 563 (1966), and which permits the continued existence of an illegal monopoly on the grounds that it allegedly benefits independent retail grocers presents substantial questions of public importance. Probable jurisdiction should therefore be noted.

Respectfully submitted,

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Supp. 13 (S.D.N.Y. 1955); *United States v. Bearing Distributors Co.*, 18 F.R.D. 228 (W.D. Mo. 1955); *United States v. American Soc'y of Composers, Authors & Publishers*, 11 F.R.D. 511 (S.D.N.Y. 1951); *United States v. General Elec. Co.*, 95 F. Supp. 165 (D.N.J. 1950).

Petitions to intervene made after the entry of decree were granted in the following cases: *Missouri-Kansas Pipe Line Co., v. United States*, 312 U.S. 502 (1941); *United States v. Vehicular Parking, Ltd.*, 7 F.R.D. 336 (D. Del. 1947); *United States v. California Co-op. Canneries*, 279 U.S. 553 (1929) (dictum); *United States v. Terminal R.R. Ass'n.*, 236 U.S. 194 (1915); *Olympic Ref. Co. v. Carter*, 332 F. 2d 260, (9th Cir.) *cert. denied*, 379 U.S. 900 (1964); *United States v. Swift & Co.*, 286 U.S. 106 (1932).

(Appendices follow)